No. 2574.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

[illegible] FLEISCHMAN,
Plaintiff in Error,

vs.

[illegible]IUS RAHMSTORE,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Filed this day of , A. D., 1915.
FRANK D. MONCKTON, Clerk,

By Deputy Clerk.

[illegible]

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Additional Statement of Facts.

M. P. Fleischman, the plaintiff in error, for a period of about twelve years, beginning in the spring of 1898 (Record p. 44) and up to the 26th day of May, 1910, was engaged in the business of dealing in and vending groceries, hardware, dry goods, shoes, talking machines, and generally everything in the line of general merchandise as needed in a mining camp (Record p. 33) at Rampart, Alaska, and some time in May, 1910 he entered into negotiations with Julius Rahmstorf, the defendant in error, to sell his said business to him, which

said negotiations were completed on the 26th day of May, 1910, when the stock was finally invoiced and the purchase price of $1791.15 paid by defendant in error and a receipt given by plaintiff in error. That at the time of payment of the purchase price and in consideration thereof and as a part of the transaction the plaintiff in error prepared, executed and delivered to the defendant in error (Record p. 31 & 48) the agreement in writing set out in full in the pleadings in this case (Record p. 14), in which the plaintiff in error, among other things, did "agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913." That from said 26th May, 1910, the defendant in error has carried on said business, for a time and up to the 1st January, 1912, employing the plaintiff in error as a clerk in the store. That on the 1st June, 1910, the plaintiff in error went personally to the town of Tanana, Alaska, and in the name of one F. J. Kalning personally selected and had shipped to Rampart, Alaska, a stock of general merchandise, hardware, etc. (See Exhibits 1 & 2, Record pp. 22, 23, 24, 25), and a few days thereafter opened a general merchandise store in

the town of Rampart about 500 feet distant from the business then being conducted by the defendant in error, and personally conducted and had general supervision of said merchandise business as managing clerk, and from that time has been so engaged in conducting a like business to that of the defendant in error. For this alleged breach of contract the defendant in error brought suit against the plaintiff in error on January 13th, 1913, for the sum of $2000.00 damages, being the sum fixed by the parties in the agreement to not engage in business in the town of Rampart.

Answering Argument.

Plaintiff in error in his brief (p. 15) tries to make the point that the sale of the stock of merchandise and business was completed some time prior to the date of the agreement not to engage in business in Rampart, and that the agreement was not part of the sale of the stock of goods.

If the sale was not made on the 26th May, 1910, at which time the parties finally finished removing the goods to the new location, completed the invoicing to ascertain the price to be paid, signed and delivered the receipt for purchase price—where in the record is there any testimony to support a finding for another and earlier date? The only testimony relied upon by plaintiff in error is as follows: (Fleischman) "As soon as I sold to Rahmstorf, about May 20, 1910, we started to take

an inventory and move the stock about May 21, the day the sale was made." (Record p. 44; Brief p. 15). This is very indefinite as it mentions two different days, May 20th and May 21st, and it also intimates that there was still something to do before the price could be ascertained. There is considerable testimony by both parties showing after negotiations were entered into that before the sale could be completed the goods would have to be moved to the new location and inventoried, and nowhere in the testimony does it appear that there was an intention upon the part of Rahmstorf, defendant in error, that title passed at any earlier date than 26th May, 1910, when the goods were invoiced and the money paid. (Record p. 36).

The general rule with regard to the passing of title is well stated in 35 Cyc. 283, and there is nothing in the record to take this question of time of passing of title out of the general rule as there laid down. There was something to be done to the goods by both the buyer and seller before title passed.

Rahmstorf says: "We then on May 19th, commenced moving his (Fleischman's) stock to the building which I now occupy * * * He moved his stock in there and invoiced it, and ascertained the prices as near as we could, which occupied several days." (Record p. 31). Fleischman, plaintiff in error, says: " * * * We started to take inventory and move the stock * * * " (Record

p. 44) which indicates that he, the seller, had something to do to the goods before title was ready to pass. And again plaintiff in error on his direct examination testifies: "I started to collect rent from Rahmstorf on May 26th, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods sold to Rahmstorf." (Record p. 45). We submit that the sale of the stock of merchandise and business, including the good will, was completed, and title passed from the seller to the buyer, on May 26th, 1910, and that plaintiff in error has failed to show that it was on another and earlier day.

The Agreement Not to Engage in Like Business for Three Years Was Incidental to the Sale.

Fleischman, plaintiff in error, on direct examination testified as follows: "Mr. Rahmstorf asked me on the 26th of May, or after that, I don't remember just when it was, if I would have any objection to making such an agreement. I told him no; that I didn't think I would ever go into business again; I figured on going outside." (Record p. 45). "The circumstances with reference to my signing the contract Plaintiff's Exhibit A were: I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf. Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more

for three years. I told him "No; I will give you that agreement. I am not going in business any more." This was all done in the store. There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession." (Record p. 47). Altho plaintiff in error warps and twists his testimony in an attempt to show that the agreement might not have been written and executed until after the 26th day of May, he has not the nerve to come out strong and say positively that it was not signed on the day it bears date, and even goes so far as saying: "I think it was the 26th of May." (Record p. 47). In paragraph III of his further separate and affirmative answer and defence he alleges: "That on or about the first day of June, 1910, the defendant gave to the said Rahmstorf a paper writing in words and figures in substance and effect, as follows." (Record p. 9). However, at the trial he does not testify to this as the date, but corroborates the straight and positive testimony of defendant in error, who says: "I also told him * * he would have to make a contract that he was going to leave the country, or that he was not going to conduct any business, which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway." (Record pp. 30-31). This conversation took place some time prior to 26th May, when negotiations began between the

parties. Defendant in error further says: "Then on May 26th—I already told him before that I was willing to settle with him, to pay the purchase price —on May 26th I told him to have this agreement which we made before—(objection by Mr. Gillette). He then retired to the corner which he used as a postoffice in my own place, and on his own typewriter he drew up the agreement, and signed it, and witnessed it by F. J. Kalning. After he handed me the signed agreement, I paid him the price of eighteen or nineteen hundred dollars—I don't remember exactly how much—which closed the whole transaction." (Record p. 31). Nowhere in the record is this testimony given by defendant in error, that the agreement to not engage in business was signed and delivered to him before the purchase price for the goods was paid over, disputed or denied; there is therefore nothing in the record in this case tending to bolster up plaintiff in error's contention that the agreement was not a part of and incidental to the sale of the business, but on the contrary it has been clearly shown that said agreement to not engage in business was incidental to the contract of sale and that the consideration for this agreement was the price paid for the business and good will.

Plaintiff in error, in his Brief p. 17, says that: "Rahmstorf shows himself by the record to be a shrewd business man; he is not that happy-go-lucky sort indigenous to the Far North, otherwise

he would not have conceived the idea of getting a contract to refrain out of Fleischman before he left the country." Now let us see what the attitude of plaintiff in error was at the time he signed the agreement. He says in his Answer that he "signed said paper because of his intention to leave Alaska as aforesaid, **and believing the same could not be enforced in any event."** (Record p. 10). (Black face ours.)

What does the Circuit Court of Appeals think of a man who deliberately enters into a contract for a valuable consideration, believing at the time he does so that it can not be enforced against him, and then complains afterwards that it was done for the purpose of oppression and for the purpose of running him out of the country, (Brief p. 18) and this notwithstanding the fact that he drew the agreement himself, using his own language, on his own typewriter, without pressure or duress of any kind brought upon him by defendant in error; and further admitted on direct examination in answer to Rahmstorf's question if he had any objection to making such an agreement: "I told him No; that I didn't think I would ever go into business again; I figured on going outside." (Record p. 45). He has certainly shown his willingness to make this agreement, and there is no strength to his argument that it was separate and apart from the sale of his business.

There Was a Breach of Contract.

Plaintiff in error admits:

(1) That he was employed in Kalning's store (Miners' Store) continuously since June 1st, 1912, until May 26th, 1913, and after. (Record p. 39).

(2) He went to Tanana and purchased the goods for Kalning (Exhibits 1 & 2), and that Kalning was not along. (Record pp. 46 and 49).

(3) He did the corresponding for Kalning. (Record p. 49).

(4) He had full supervision of the store when Kalning was not there. (Record p. 50).

(5) Kalning was away from Rampart most of the time—only at the store once a week or once in two weeks (Record p. 49) until September 1912, when Kalning ceased mining operations. (Record p. 51).

(6) He had the care, custody and management of the store as clerk. (Record p. 50).

(7) Was selling the same kind of goods Rahmstorf is selling, except liquors. (Record p. 50).

(8) He ordered goods for the store in his own name. See plaintiff's Exhibit "C." (Record pp. 17 to 21).

Defendant in error, Rahmstorf, testified in substance as follows:

(a) Fleischman the defendant (plaintiff in error) is managing that store. Kalning was engaged in mining on Little Minook Creek and only

was in the store on Sundays up to fall of 1912. (Record p. 34).

(b) Fleischman always did the business; from Kalning's actions he never did any business there at all so far as I am concerned. * * * (Record p. 35).

After reading the testimony of both parties there can be no doubt but that plaintiff in error from June 1st, 1912, to September, 1912, was in sole charge of the store, the alleged owner, Kalning, during that period being engaged in mining and only coming to the store once in a week or two, and then taking no part in the business, and after closing down his mining operations Kalning seems to have acted more as a handy man, "chopping wood, carrying water, delivering goods and doing all sorts of work outside the store," (Record p. 35) leaving Fleischman, plaintiff in error, in full charge.

As to whether these acts of plaintiff in error constituted a breach of the contract, the following authorities are cited as being in point:

Canady v. Knox, 94 Pac. 652, (Wash.) where defendant was employed in some capacity in a meat market after selling his business with the good will, coupled with an agreement that "he will not enter into the butcher business, nor kill any animals for the purpose of peddling or sale of any nature, only for his own private use in the town of Almira or adjacent territory," the court says:

"His own evidence shows that he violated

"this agreement. He killed and butchered "animals for sale in Almira, being for purposes other than his own private use. He "had been engaged in the new market either as an employe or in some other capacity, and had also peddled meat in and near "Almira from a delivery wagon. The evident intention of the written contract was "that the appellant should in no way compete with the respondent's business either "himself, personally, or in any other manner, directly or indirectly. Such intent is "shown by the one specified exception reserving to appellant the right to kill animals for his own private use. There would "be no question of his having violated the "contract, even though he had been permitted to show that the new market was owned and operated by Flynn, and that he was "Flynn's employe."

In **20 Cyc. 1280**, we find the following:

"It is not unusual for the seller of the goodwill of an established business to enter "into an agreement with the buyer to refrain from entering into competition with "him within specified territorial limits or "for a specified time. So long as the purchaser continues in the business, and the "stipulation remains in force, the vendee "cannot lawfully enter into competition

"with him either on his own account or as "the agent and business manager of an- "other."

Also Vol. 24 American & English Ency. of Law, p. 859. (2nd Ed).

"Acting as Agent or Employe.—A covenant "not to carry on a certain trade is broken "where the covenantor does so as the agent, "or manager, or employe of another."

GEIGER V. CAWLEY, (Mich.) 109 N. W. 1064, wherein it is held that:

"An agreement of one not to carry on a "certain business in a certain place for a "certain time, on penalty of paying a cer- "tain sum, is breached by his carrying it "on as trustee of another." (Syllabus)

"Had defendant desired to reserve the right "to carry on business for others, he should "have inserted it in the contract." (p. 1065)

American Ice Co. v. Meckel, 95 N. Y. Supplement, p. 1060, being the case of an ice dealer who sold his business and good will with agreement not to engage in the business, directly or indirectly. We quote from the syllabus:

"The defendant remained in the business in "the employ of the successive owners, and "for several years had charge of the busi- "ness at West Washington Market as the "agent of the plaintiff. The plaintiff pre- "sents a prima facie case that the de-

> "fendant left its employ, and entered the "employ of one of its competitors, and has "endeavored with considerable success to "solicit the customers of the plaintiff, who "were formerly customers of Mulford & "Meckel to become customers of his new "employer. This is clearly a violation of "his covenant, to the right to enforce which "the plaintiff has succeeded."

The facts in this case are somewhat similar to the case at bar, and answers the argument of counsel for plaintiff in error in their Brief p. 22, where they say: "Rahmstorf himself caused the first breach thereof by employing Fleischman as a clerk in his own store." This is weak argument and foolishness, as courts look with favor upon contracts of the nature of the one in suit and give it that construction which seems most in consonance with the intent of the parties. An established business in a desirable locality has value independent of the actual value of the stock that may be on hand. Fleischman had been in business at Rampart for about twelve years when he sold to Rahmstorf. It is obvious that the purpose of this agreement was to transfer to Rahmstorf as far as could be done the personal favor of Fleischman in the community. This purpose was accomplished in the only way it could be accomplished, namely, by an agreement on the part of Fleischman that he would not engage in any way in the line of general merchandise

in Rampart for three years. It is likewise obvious that Rahmstorf would not have the benefit of this part of his bargain if Fleischman is permitted to engage in the same line of business within the prohibited time in the town of Rampart where he was well known and in which his personnel, influence and popularity would favor the competing business to the injury and damage of Rahmstorf, and there was and could be no breach or waiver of the agreement by reason of Rahmstorf employing Fleischman for a season. In the American Ice Co. v. Meckel case above cited the defendant remained in the employ of the company he sold to for several years before he engaged with a competing business, but the court did not take that fact into consideration in his favor in holding that he had violated his agreement.

In **Jefferson v. Narkert & Company, 112 Ga. 498, 37 S. E. 758**, the court in considering a parallel case where the defendant had obligated himself not to engage in the business of selling, handling or packing meats during a specified and reasonable time said that the defendant—

> "could not, without violating that contract,
> "carry on in that city, during the period
> "covered by the agreement a similar busi-
> "ness for another, or in another name, of
> "which he was the exclusive manager, and
> "the success of which depended upon his
> "skill, efficiency, influence, and popularity.

"* * * The contract is not confined to "preventing him from entering upon such "business in his own name, as owner and "proprietor thereof. It can be violated as "much by an employe and agent, especially "one who has the conduct and control of "the business, as it could were he the pro-"prietor of the business in which he en-"gaged."

See also **Nelson v. Delaney** (Ia.) 113 N. W. 843. (Deft. engaged in son-in-law's business).

Nelson v. Brassington (Wash.) 116 Pac. 629.

Smith v. Webb, (Ala.) 58 So. 913.

McAuliffe v. Vaughan, (Ga.) 70 S. E. 322.

See also **Johnson v. Blanchard, 116 Pac. 973, (Cal.)** in which the Court says:

"Another ground of objection to the com-"plaint is that it appears therefrom that "defendant was not engaged in business on "his own account, but merely as the em-"ploye of others. It appears that defendant "was conducting the business under the "name of Rynerson-Blanchard Company, "and that he, together with his wife and "her father, owned the business, and that "he was manager and executive head there-"of. The complaint thus clearly shows that "defendant had 'entered into a similar busi-"ness to that contracted to be sold.' Con-"ceding that he possessed no pecuniary in-

> "terest in the enterprise, nevertheless en-
> "gaging in soliciting business for the Ryner-
> "son-Blanchard Company, who was a com-
> "petitor of plaintiff, was a violation at
> "least of the spirit of his covenant."

and in **Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650**, the court says:

> "It is the duty of the court to restrain the
> "contracting parties from violating the
> "spirit, as well as the letter of the agree-
> "ment. Under a fair and just interpre-
> "tation of its terms, the stipulation meant
> "that the three defendants would not en-
> "gage in business, so as to bring their skill,
> "names, and influence to the aid of any
> "competitor carrying on the same trade
> "within the prohibited limits."

It is argued in the Brief of plaintiff in error (Brief p. 22) that no ulterior interest on the part of Fleischman in the Miners' Store can be presumed under the pleadings or the facts proved, and that Fleischman avoided EVEN THE APPEARANCE OF EVIL by withholding his own name or credit from the business, and also that he never endeavored to draw off any trade or customers of Rahmstorf. (Brief p. 21; Record p. 47). However, it is evident from the record that Fleischman expected trouble from Rahmstorf on account of his engaging in the merchandise business at Rampart within the prohibited period, and evidently his theory regarding

the matter was that as long as he did not carry on business in his own name he would not violate his agreement to refrain, hence he says: "I kept a very accurate system of books and papers for F. J. Kalning while I was clerking for him. I was careful that any little item billed to myself was corrected in each case, because I had heard that Mr. Rahmstorf threatened to bring suit against me. I was careful that no article should be charged to me, except perhaps talking machines." (Record p. 49) but the record nevertheless shows that people dealing with him thought he was the man running the business or they would not have consigned goods to his name, (See Exhibit C, Record pp. 17-21) nor was it necessary for Rahmstorf to allege and prove that Fleischman had drawn off any of his trade or customers.

Johnston v. Blanchard, 116 Pac. 973.

As to Amount of Damages Contemplated by Parties.

Counsel for plaintiff in error take up nearly four pages in their brief to discuss the question as to "What damages were contemplated by the parties in case of a breach?" (Brief pp. 23-26). The damages in a case of this sort must necessarily be uncertain and difficult, if not impossible of accurate determination, and therefore come within the rule permitting parties to agree upon what the damages shall be, and the same may be enforced as liquidated damages.

13 Cyc. 99.

Canady v. Knox, 86 Pac. 930, and cases cited therein. During the year Fleischman was violating his contract by accepting employment from a competitor, Rahmstorf testified that he did about $20,000 general merchandise business, (Record p. 41) and that as a consequence of Fleischman's breach "the sales decreased quite heavy, at least fifty per cent," (Record p. 34), so it would appear from the record that the sum fixed by the parties in the agreement can not be so grossly disproportionate to the actual damages as to be unconscionable; and as the trial judge said in his opinion, the result might not have been different even if evidence had been admitted to show actual damages. (Record p. 75).

Answer to Argument Upon the Law.

As to Assignments of Error I, II, III and VIII.

No reasons are given in any of the assignments why the rulings of the trial court were erroneous, and we submit also that no reasons are given in the brief showing error in these assignments. Counsel for plaintiff in error cite your honors to Vol. 13 Cyc. p. 101 on the proposition "that the general rule as to liquidated damages is not applicable to contracts for the payment of money alone; in such cases the courts construe the damages as penalty." This rule, however, does not apply to the case at bar. Just two pages ahead of this citation by counsel for plaintiff in error the court will find the fol-

lowing, which applies to the class of cases in question here under consideration, to-wit:

> "Where a contract has been made not to "engage in any particular profession or "business within stated limits, it has been "the policy of the courts to construe such "an agreement as liquidated damages rath- "er than a penalty, in the absence of any "evidence to show that the amount of dam- "ages claimed is unjust or oppressive, or "that the amount claimed is disproportion- "ate to the damages that would result from "the breach or breaches of the several "covenants of the agreement. While the "decisions in this class of cases are usually "based upon the fact that the damages are "uncertain and cannot be estimated, it has "also been held that where there is a prom- "ise to pay a particular sum in case of "breach, or where the payment of the sum "named is the very substance of the agree- "ment, a recovery may be had for the sum "named."

13 Cyc. 99.

Where is there any evidence in this case to show that the damages claimed are unjust or oppressive upon the part of plaintiff in error? Not a syllable, yet he asks this court to take it out of the general rule laid down by the courts in cases of this class, and hold that it is a penalty instead

of liquidated damages. The trial court's ruling in these particulars was correct and should not be disturbed.

As to Assignment of Error VI, VII, X, XI, XII, XIII and XIV.

Plaintiff in error having waived assignments IV, V and IX, it is unnecessary to notice them.

Most of the argument for plaintiff in error is built up from the erroneous premise that the agreement Exhibit A herein was entered into between the parties at some time after the sale of the business and good will had been completed, and upon a separate consideration. It is submitted, however, that the record plainly shows that this agreement Exhibit A was made at the time and as a part of the transaction for the sale of the business and good will, and this being the case much of the argument of plaintiff in error is not applicable to the facts as proved.

Counsel has quoted copiously from Sun Printing Co. vs. Moore 185 U. S. 642; 46 L. Ed. 366, and we may be pardoned for quoting a few words from the opinion in that case ourselves to show how the Supreme Court of the United States stands upon the doctrine of liquidated damages and penalties.

> "The decisions of this court on the doctrine "of liquidated damages and penalties lend "no support to the contention that parties "may not bona fide, in a case where the

"damages are of an uncertain nature, esti-
"mate and agree upon the measure of dam-
"ages which may be sustained from the
"breach of an agreement. On the con-
"trary, this court has consistently main-
"tained the principle that the intention of
"the parties is to be arrived at by a proper
"construction of the agreement made be-
"tween them, and that whether a particular
"stipulation to pay a sum of money is to
"be treated as a penalty, or as an agreed
"ascertainment of damages, is to be de-
"termined by the contract, fairly construed,
"it being the duty of the court always,
"where the damages are uncertain and
"have been liquidated by an agreement, to
"enforce the contract." (p. 662; L. Ed. 378).

Were Damages Stipulated in Agreement a Penalty Or Liquidated Damages?

Damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount fixed is not on the face of the contract out of all proportion to the probable loss.

Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398.

Ward v. Hudson River Bldg. Co. 125 N. Y. 230; 26 N. E. 256.

Defendant in error contends that the sum of $2,000 Fleischman promised to "forfeit" in his contract should he engage in the line of general merchandise within three years from May 26th, 1910, can only be construed by the court as "liquidated damages" and not as a penalty, and that when the defendant in error showed a breach of that covenant he was entitled to stand strictly upon the terms of the same, and the award by the trial court of the amount fixed by the parties themselves was just and proper.

The courts have long recognized the difficulty arising in fixing the actual damages in cases of this character.

In **1 Suth. Dam. p. 507**, the author says:

> "The damages for breach of contract for "the purchase of the good will of an established trade or business are so absolutely "uncertain that courts have recognized the "fullest liberty of parties to fix beforehand the amount of damages in that class "of cases. In the decision of such cases "the strongest expressions are to be found "to the effect that courts have no power "to defeat that intention on the pretext of "relieving from a bad bargain."

The Supreme Court of the State of Washington has passed directly upon this point in a case on all fours with the one at bar, the term of contract, the amount to be "forfeited" in case of breach

and language being similar, being the case of **Canady v. Knox**, 86 Pac. 930, the Syllabus being as follows:

> "Where the contract for the sale of a "butcher business obligated the sellers not "to again engage in business in competi-"tion with the buyer for a term of three "years, and provided that on breach of such "provision the sellers would forfeit to the "buyer $2,000, such amount was prima "facie an agreement for liquidated dam-"ages, and not a penalty."

This same case was again before the Supreme Court of Washington reported in 94 Pac. 652, when the question under consideration was again raised, and the court said:

> "Some contention is made by appellant to "the effect that the $2,000 named in the "contract was a penalty, and that no actual "damages has been shown. In our former "opinion (86 Pac. 930) we disposed of this "suggestion contrary to appellant's con-"tention, and that decision has become the "law of this case. The appellant at no "time asked to introduce evidence in addi-"tion to that above mentioned. His own "testimony sustained respondent's allega-"tion that he had violated the contract. "He and respondent had agreed on the "stipulated damages for such violation,

"and the court properly directed a judg-
"ment in respondent's favor."

(Canady v. Knox, 94 Pac. 652)

In **Potter v. Ahrens, 43 Pac. 388. (Cal.)**, it was contended that the plaintiff was not entitled to the amount of damages found by the court. No evidence was put in by plaintiff to establish any actual damages suffered, but relying upon the stipulation on that subject contained in the contract of sale, plaintiff contented himself with showing a breach of the latter, and rested. The contract provided that for a violation of their covenant to refrain from engaging in a like business the defendant agreed to pay to the purchasers, or to their assigns, "the sum of $3,000 as liquidated damages." Defendant contended that this provision was in the nature of a penalty, notwithstanding the amount therein designated is termed "Liquidated Damages," and that plaintiff was required to prove the actual damage suffered by him, and be confined to the amount as shown. The court in its opinion said:

"This contention is clearly untenable. While
"the definition of parties in contracts of
"this character is not the invariable and
"controlling guide for construction, the
"subject-matter of the contract in this case
"was such as, in its very nature, in case
"of a breach, to render the proof of dam-
"ages extremely difficult, if not impossible,

> "and to manifestly make a case for liqui-
> "dated damages."

Defendant in error cites the following cases as also being in point on this question:

Hull et al. v. Angus, et al., 118 Pac. 284 (Or) (See 6th & 7th Syllabi and p. 288).

Shafer v. Sloan, 85 Pac. 162-3 & cases cited therein.

Geiger v. Cawley, 109 N. W. 1064.

Wills v. Forester, 124 S. W. 1090 (Mo) Syllabus as follows:

> "Damages: Where a contract not to en-
> "gage in a rival business in a particular lo-
> "cality within a specified time provides for
> "the payment of a stipulated sum on a
> "breach, the amount is regarded as liqui-
> "dated damages and not as a penalty."

As to Assignment XIV. Amendment at Trial.

There could be no error in the court allowing plaintiff below to amend his complaint by inserting in paragraph VI the words "As managing clerk of the Miners' Store," as the trial judge in granting the amendment aptly said:

> "I do not see that it would particularly
> "change the issues here. I don't see that
> "the defendant's testimony would have
> "been any different." (Record p. 55).

Counsel in their brief (p. 38) ask: "If the purpose of the contract was to exclude Fleischman from accepting employment as a clerk, why did

Rahmstorf employ him?" We answer this by asking another question: If Fleischman desired to reserve the right to carry on business for others as agent or manager, why didn't he insert it in his contract. See **Geiger v. Cawley, supra, p. 1065.**

As to Assignments XV, XVI, XVII and XVIII.

Plaintiff in error has something to say under this sub-heading in his brief (pp. 38-39) which squints at the proposition that the contract in question was unlawful, being in restraint of trade or business, and cites a number of cases, not one of which has reference to a contract to refrain from engaging in business after selling the good will thereof, and a remarkable thing about plaintiff in error's brief is that counsel seem to have studiously kept away from citing any single case therein in which the subject-matter of the action was a contract in any way similar to the one in this case. On this question of restraint, in addition to the cases already cited, many of which touch upon this subject, we cite especially **Thomas v. Gavin, (N. M.) 110 Pac. 841.**

In conclusion we submit that plaintiff in error has failed to point out to the court any error of the trial court which would warrant a reversal of the case or that the matter should be remanded for trial on the issue of damages. The weight of authority is unquestionably in favor of enforcing contracts such as the one under consideration, and de-

fendant in error prays that the judgment of the trial court be affirmed.

Respectfully submitted,

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Dated Fairbanks, Alaska.
April 22nd, 1915.